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IN THE MATTER OF THE LAND ACQUISITION ACT.

HEYSHAM. v. BHOLANATH MULLICK.

BHOLANATH MULLICK. v. HEYSHAM

Rs. 141-3-3, making a total of Rs. 565-3-3 as the monthly rental of the land. That makes an annual rental of Rs. 6,783-9-6, being little short of Rs. 6,784. Deducting from that 12 per cent. for taxes and collection charges amounting to Rs. 814-0-7, we have Rs. 5,969-8 9, which at, 6 years' purchase is Rs. 95,518-2-4, and that is the amount of compensation which we think ought to be awarded, to that the 15 per cent. is added, the amount is Rs. 1,09,845-9-7, which is the sum we consider ought to be awarded.

In the Court below Rs. 1,492-2-5 was allowed to the claimant as costs, and to each of the Assessors Rs. 300. As we in fact give to the claimant more than the learned Judge gave, it is equally proper that he should have his costs. I do not know whether under the Act it is necessary for us to make any order about those costs, but in case of any doubt we confirm the allowance of costs. With regard to the costs of the appeal, we think the parties should pay their own costs.

Attorneys for Mr. Heysham: Messrs. *Berners & Co.*

Attorneys for Bholanath Mullick: Messrs. *Trotman & Co.*

APPELLATE CIVIL

Before Mr. Justice Markby and Mr. Justice Birch.

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May 13.

BRINDABUN CHUNDER ROY (PLAINTIFF) *v.* TARACHAND BUNDOPADHYA (DEFENDANT).*

Act VII of 1859, *s.* 230—*Possession—Title—Limitation.*

The defendant purchased in 1856 from the Official Assignee certain property belonging to one *D*. In 1867, he brought a suit against the heirs of *D* for possession of the property purchased; he obtained a decree in May 1869, under which he obtained possession in May 1870. In June 1870, the plaintiff filed a petition under s. 230, Act VIII of 1859, alleging that he had purchased the property claimed from the heirs of *D* in 1864, and had been in possession until he was ousted by the defendant, and that he was not a party to the suit

* Special Appeal, No. 1198 of 1872, from a decree of the Officiating Judge of East Burdwan, dated the 29th May 1872, affirming a decree of the Subordinate Judge of that district, dated the 30th September 1871.

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bronght by the defendant in 1867. *Held* that the title of the defendant was barred, more than 12 years having elapsed from the date of his purchase, and that the plaintiff was entitled on mere proof of *bonâ fide* possession and that he was not a party to the suit by the defendant in 1867, to put the defendant to proof of his own title, and on the defendant's failing to prove his title, to be restored to possession.

Baboos *Romesh Chunder Mitter* and *Rashbehary Ghose* for the appellant.

The *Advocate-General*, offg. (Mr. *Paul*), Baboos *Kallyprosonno Dutt* and *Tarrucknath Sein* for the respondent.

THE facts and arguments are sufficiently stated in the judgments :—

MARKBY, J.—The facts of this case as stated to us are, that one Dad Ally, who was then owner of certain immoveable property, became insolvent in the year 1853.

The property now in suit was sold, together with several other properties, by the Official of Assignee, to one Tarachand, the defendant, in the year 1856.

In the year 1867, Tarachand commenced a suit to obtain possession under his purchase of this and the other properties. The suit was instituted against the heirs of Dad Ally ; but several other persons applied to be made defendants in this suit, claiming various portions of the property under different titles. On the 14th May 1869, Tarachund obtained a final decree, which included the property now in suit. On the 19th May 1870, Tarachand, in execution of his decree, took possession of this property.

On the 16th June 1870, the plaintiff presented a petition under s. 230 of the Code of Civil Procedure, alleging that he was in *bonâ fide* possession of that portion of the property to which the present suit relates ; and that he was not a party to the suit in which the former decree was passed. Accordingly his application was, as the Code directs, registered and numbered as a suit.

The plaintiff has now proved that, in execution of a decree passed in the year 1852 against Dad Ally, execution was taken

out after Dad Ally's death, under s. 210, against the heirs of Dad Ally, and that the property he now claims was sold in execution of that decree in the year 1864 : at that time the heirs of Dad Ally were in possession. The plaintiff took possession under his purchase, when exactly is not stated, but at some time prior to 1867. He was not made a party to the suit brought by the defendant in 1867. The District Judge thinks that the execution-creditors, when they took these proceedings in execution, must have known that Dad Ally's heirs were not entitled to the property ; but he says that it was stated on behalf of the defendant that no collusion or complicity was charged against the plaintiff.

Both the lower Courts have dismissed the suit.

The plaintiff appeals and raises two contentions : first, that the title of the defendant Tarachand was extinguished in favor of himself as soon as the twelve years from the date of his purchase had elapsed, and that he has, therefore, proved his title ; secondly, that under s. 230 he ought to be restored to possession, even without, proof of title, upon proof that he was *bonâ fide* in possession, and that he was not a party to the suit.

The second point is, I think, stated too broadly, I am not prepared to say that, under s. 230, a party, who has been dispossessed in execution of a decree to which he is not a party, can, on mere proof of *bonâ fide* possession, claim to be restored. But I think he can, on mere proof of *bonâ fide* possession, call upon the defendant to prove his title, and that I understand to be the result of the judgment of the Chief Justice in *Radha Pyari Debi Chowdhrain* v. *Nabin Chandra Chowdhry* (1).

The question, therefore, arises, has the defendant proved his title ? I think he has not. It seems to me that we cannot hold that he has done so without impugning doctrines that have been already clearly laid down in this Court and in the Privy Council. It has been laid down by the Privy Council, in the case of *Gunga Gobind Mundul* v. *The Collector of the 24 Pergunnahs* (2), that " the law has established a limitation of twelve years ; after that time it declares not simply that the remedy is barred,

(1) 5 B. L. R., 708. (2) 11 Moore's I. A., 345 ; see 360 & 363.

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but that the title is extinct in favor of the possessor." And in an earlier passage they say that the right to "sue for dispossession belongs to the owner of the lands encroached upon, and if he suffers his right to be barred by the law of limitation, the practical effect is the extinction of his title in favor of the party in possession." It also appears to me to be an accepted doctrine in our Courts that, if a party who has been twelve years out of possession, and whose suit is therefore barred, should again get into possession he is not (to use an English phrase) remitted to his old title ; our Courts adopting, as pointed out by Sir Lawrence Peel in *Sibchunder Doss* v. *Sibkissen Bonnerjee* (1), the English rule that there is no remitter to a right for which the party had no remedy by action at all. This decision was quoted and approved of by Loch and Mitter, JJ., in *Raja Baradakant Roy Bahadur* v. *Prankrishna Paroi* (2), and the principle here laid down has been applied exactly in the same way to the English statute of limitations (see *Brassington* v. *Llewellyn* (3).) I may add that the decision in *Gunga Gobind Mundul* v. *The Collector of the 24-Pergunnahs* (4) was given upon the law of limitation as it existed prior to 1859, but the principle of that decision has been frequently applied to Act XIV of 1859, which governs the present case.

The question, therefore comes to this :—Had the defendant allowed his right to be barred by the law of limitation ? It seems to me that he had. His cause of action arose when his purchase was completed in the year 1856. His right (as he himself admits) to possession was then denied by Dad Ally, and subsequently by Dad Ally's heirs. Nevertheless, he did not commence any suit to recover possession till the year 1867 ; and the persons whom he then sued, the heirs of Dad Ally, had then parted with their interest in, as well as their possession of, this portion of the property, and (if it has any bearing on this point) the lower Appellate Court finds that the defendants must have known when that suit was brought that the plaintiff was in possession of this property. I think, there-

(1) 1 Boul. Rep., 70 ; see 79.
(2) 3 B. L. R., A. C., 343.
(3) 27 L. J., Ex., 297.
(4) 11 Moore's I. A., 345.

fore, that this stands as a simple case in which the party out of possession has omitted to sue upon his cause of action for twelve years ; that his right is thereby barred ; and that his title is extinct. Hence it follows that, even if the plaintiff has proved no title, still the defendant has proved none either ; and that therefore under s. 230 the plaintiff ought to be restored to possession.

But I also think (which is the plaintiff's first contention) that the plaintiff has proved his title. The Privy Council say, in the case of *Gunga Gobind Mundul* v. *The Collector of the 24-Pergunnahs* (1), not only that the title of the party whose right is barred by the statute of limitation is extinguished, but that it is extinguished in favor of the possessor. When the twelve years expired in this case, the plaintiff was in possession, and was he "the possessor" within the meaning of this rule ? I understand it to be admitted by the Advocate-General, and I think it cannot be disputed, that by the possessor is here meant not only the person in original possession, but any person who comes in under him during the twelve years by inheritance, will, or conveyance. But if this be so, I do not see how the plaintiff can be excluded. I understand the principle of law to be that a person in possession without title has an interest in the property good as against all the world except the true owner, which interest is capable of being dealt with, until the true owner interferes, just in the same way as if it were unimpeachable, and that it, therefore, passes by conveyance or device. Why then should it not pass by an execution-sale ? The plaintiff, as purchaser at an execution-sale, received a certificate, which is by law (s. 259 of the Code of Civil Procedure) "a valid transfer of the right, title, and interest of the judgment-debtors in the property sold." Dad Ally was the judgment-debtor and died in possession. His interest in the property, though without title, was of such a nature as would pass by inheritance to his sons—*Doe* d. *Carter* v. *Bardnard* (2). It did so pass ; and afterwards passed by the execution-proceedings from his sons to the plaintiff just as

(1) 11 Moore's I. A., 345. (2) 13 Q. B., 945; S. C., 18 L. J., Q. B., 306.

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completely as by a private sale. As against all the world except the defendant that execution-sale passed to the plaintiff an unimpeachable title, and as soon as the defendant's suit was barred, the plaintiff's title was complete.

The conclusion that the plaintiff's title is necessarily established if the defendant's title is barred, seems to me warranted by good sense as well as law. It seems to me to be almost an absurdity that there should be any case of land without an owner when there is a person in possession of it who cannot lawfully be disturbed.

I base this decision on the assumption which is warranted by the judgment of the lower Appellate Court that the plaintiff acted in good faith in purchasing this property. Had the plaintiff obtained possession of the property by fraud or violence, it may be that the case would have to be considered under a somewhat different aspect.

The decisions of both the lower Courts will be reversed, the decree dismissing the suit will be set aside, and the plaintiff will have a decree for possession with costs in this Court and the Courts below.

BIRCH, J.—The plaintiff derives his title under a purchase at an execution-sale; the defendant claims the property under a prior conveyance from the Official Assignee as representative of Dad Ally, the original proprietor. No distinction can be made between a person claiming under an execution-sale as contradistinguished from a person claiming under an ordinary conveyance—*Raja Enayel Hossein* v. *Giridhari Lal* (1). The defendant purchased on the 3rd December 1856. The plaintiff purchased in 1864. The defendant could not get possession from Dad Ally or his heirs. The plaintiff succeeded in obtaining possession in 1864 without intervention of the Court. In 1867, nearly eleven years after his purchase, the defendant brought a suit against Dad Ally's heirs for confirmation of his title and possession, but he did not make the present plaintiff, though then in possession, a party to the suit. The defendant obtained a decree, and in execution thereof dispossessed the

(1) 2 B. L. R., P. C., 75.

plaintiff on the 16th June 1870. The plaintiff comes into Court under s. 230, alleging that his possession was rightful, and that he was no party to the decree under which the defendant has taken possession of his property. Under s. 230 the applicant is not bound to do more than prove that he was really and *bonâ fide* in possession; he is not bound to start his case by proving his title. The matter in dispute is the right of the decree-holder to dispossess the applicant, and the decree-holder is at liberty to give evidence of his title, and prove that the property really belongs to him. Unless the decree-holder can show a better title than the applicant, the latter ought to be restored to possession. Both the Courts have found that the plaintiff is an innocent purchaser free from all imputation of collusion with the judgment-debtors, and that he has been in possession of the property since 1864. Under cover of the decree obtained against the heirs of Dad Ally, the defendant has succeeded in dispossessing the plaintiff. He could not have done this by any regular suit as he would have been barred by limitation. He could not dispossess the plaintiff until he had succeeded in setting aside the execution-sale and the right acquired thereby. There is no provisions in the Indian Limitation Act, XIV of 1859, analogous to that of s. 34, 3 & 4 Wm. IV, c. 27, which declares that the right and title of the party out of possession is extinguished at the end of the period of limitation prescribed by the statute. But it has been held by the Privy Council in *Gunga Gobind Mundul* v. *The Collector of the 24-Pergunnahs* (1), and by this Court in several rulings following on that judgment, that, if a person suffers his right to sue for title to be barred by limitation, the effect of his laches is the extinction of his title in favor of the person in possession. And I apprehend it to be now well established that, when his remedy is barred, the right and title of a claimant is extinguished and transferred to the person in possession. The dispossession of the plaintiff by the Nazir was in reality wrongful as he was no party to the suit, and had the Court ordering execution known how the matter stood, no order for dispossession could have been given under s. 223,

(1) 11 Moore's I. A., 345.

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and it would be inequitable to hold that the plaintiff is to be damaged by a wrongful dispossession, and that he is to be put to proof of his title when, had his possession been undisturbed, it was good against all the world. The defendant's remedy, if he ever had any against the plaintiff, is barred, and his right and title in extinguished in favor of the plaintiff. I concur in thinking the plaintiff entitled to a decree. The order of the lower Court must be reversed, and the appeal decreed with costs.

Appeal allowed.

PRIVY COUNCIL

P. C.* 1871 *Dec.* 9.

JOGENDRO DEB ROY KUT (DEFENDANT) *v.* FUNINDRO DEB KOY KUT (PLAINTIFF).

[On appeal from the High Court of Judicature at fort William in Bengal.]

Evidence—Judgments in Rem—Legitimacy.

In a case of disputed succession to a raj, *A*, one son of the Rajah, deceased, was put into possession under Act XIX of 1841, and a suit, brought against him on behalf of another infant son B, filed on proof of the legitimacy of *A*. A third son *C* now claimed to be entitled against *A*'s son on the ground that *A* was illegitimate, or was the offspring of an inferior marriage. *Held*, the decree in the former suit was not a bar to the further prosecution of this suit, nor would it have been had the issues in the two suits been precisely the same.

Quære—Does there exist in India (excluisve of the particular jurisdictions which are exercised by the High Courts in matters of probate and the like and which in the case of war might be exercised in matters of prize,) any Court capable of giving a judgment *in rem*? (1)

THE appellant was the grandson, and the respondent, the son, of Rajah Surbodeb Roy Kut, who died on the 14th January 1848, and disputes arose as to who was entitled to succeed

* *Present*:—THE RIGHT HON'BLE SIR JAMES W. COLVILE, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PEEL.

(1) See the Indian Evidence Act (I of 1872), s. 41,